No. 75.

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SUPREME COURT OF THE UNITED STATES.

Filed Nov. 14, 1902.

OCTOBER TERM, 1902.

No. 75.

THE OSHKOSH WATER WORKS COMPANY,

PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

MEMORANDA IN BEHALF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. No. 75.

THE OSHKOSH WATER WORKS COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

MEMORANDA ON PRESENTATION OF CLAIM.

I.

STATEMENT OF PRESENTATION SUFFICIENT.

Plaintiff intended to allege presentation of claim to common council for allowance, and to that end, alleged, "That on the 1st day of October, 1898, this plaintiff duly demanded of this defendant payment * * * of said sums. * * * That no part of same has ever been paid." The only object plaintiff could have had in making this allegation was to state, in another form, presentation of the claim for allowance and payment. In no other way could demand be made upon the defendant. The statement "duly demanded" could have no other proper object then to show presentation of claim.

The rule in Wisconsin is that the pleading is to be construed as the party making it evidently understood it. (Note 1)

In Spence vs. Spence, Chief Justice Dixon said (page 469, 455,) that the words "express understanding" were intended by the pleader as equivalent to "express contract" or "express agreement," He further said, "Such was the

NOTE 1. Spence vs. Spence, 17 Wis., 462 (448) at 469 (455); Flanders vs. McVicker, 7 Wis., 372, 377-8; Horton vs. Horton, 66 Wis., 32.

undoubted intention of the pleader; and when the language fairly admits it, it is to be construed in the sense in which it was employed by him."

In Flanders vs. McVicker, Justice Cole said (page 377):

"It does not admit of a doubt but that there is a technical defect in the reply of the appellant * * * This is certainly defective pleading, and the question is how it is to be taken advantage of under the code." (378) "In the present case we think the substance of the reply good and sufficient, but that the manner in which the allegations are made is quite defective. But still the objection is not to the substance but to the form of pleading. * * * It is very evident that this was the object of the pleader who drew the reply, although he framed the allegation in a very inartistic manner. If, however, the respondents had any doubt as to the allegations of the reply * * * they could have moved the court to require the pleadings to be made more definite and certain."

In Roe vs, Lincoln Co. Justice Orton says (page 70):

"However inartificially the facts may be presented by the complaint, or however defective, uncertain or redundant may be the mode of their statement, if a good cause of action can be gathered from it by liberal interpretation, a demurrer to it will not be sustained." (Note 2.)

In Miller vs. Bayer, Justice Marshall says (pages 125-6): "We are not called upon to determine whether the plaintiff used the most appropriate language in stating her case, but whether the language used will permit of a construction which will sustain the pleadings."

In Morse vs. Gilman, Chief Justice Dixon says (page 534 (507-8) "It is saic to be a general rule, that a complaint to be overthrown by a demurrer or objection to evidence,

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NOTE 2. Roe vs. Lincoln Co., 56 Wis., 66, 70;
Miller vs. Bayer, 94 Wis., 123, 125-6;
Morse vs. Gilman, 16 Wis., 531 (504) at 534 (507-8)

must be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand however inartificially these facts may be presented or however defective, uncertain or redundant may be the mode of their statement. Contrary to the common law rule every reasonable intendment and presumption is to be made in favor of the pleadings, and it will not be set aside on demurrer unless it be so fatally defective, that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever."

It has been repeatedly held that an allegation of "due notice" or "duly notified" or "duly gave notice" is a sufficient allegation of notice given by the proper party to the proper party or officer in due season, at proper place, in writing (if written notice were necessary), and that the notice contained the proper matter. (Note 3).

It has been repeatedly held that an allegetion that payment was "duly demanded" or that a note was "duly presented" is sufficient allegation of a demand to be made at a particular time, or place, or in a particular manner, or of the presentation of a note for payment which should be presented to a particular person, at a particular place or time. (Note 4).

An allegation that an execution was "duly issued" in case where an order of court was necessary, implies the making of the necessary order. (Note 5).

NOTE 3. Pine Valley vs. Unity, 40 Wis., 680, 682-3;
Kusterer vs. Beaver Dam, 52 Wis., 146, 149;
Arzbacher vs. Mayer, 53 Wis., 380, 386;
Nelson vs. Boom Co., 52 Wis., 647.

NOTE 4. Bank vs. Countryman, 11 Wis., 398, 399;
Cutler vs. Ainsworth, 21 Wis., 381-2;
Willis vs. Crilley, 46 Wis., 577, 579-80.

NOTE 5. Jones vs. Davis, 22 Wis., 403;
Cornell vs. Radway, 22 Wis., 251.

If the defendant desired specific information as to how demand was made, or what was done, in order to prepare for answer, his remedy was not by demurrer but by motion to make more definite and certain. (Note 6).

It is evident that both counsel for plaintiff and counsel for defendant construed this allegation "duly demanded" as an allegation that the claim had been properly presented to the common council. There is nothing in the argument of defendant's counsel to the contrary. It is also plain that the Winnebago County Circuit Court and the Supreme Court of the State of Wisconsin so understood the allegation. Both of those courts proceed upon the view that the particular qnestion, the constitutionality of the Wisconsin act, was in issue, and that that was the only issue on the demurrer. The order sustaining the demurrer (Record page 14) recites: "The plaintiff having urged in opposition to said demurrer the provision of the constitution of the United States following to-wit: "No state shall * * * pass any * * * law impairing the obligation of contracts." The entire opinion of Justice Dodge, expressing the opinion of the state Supreme Court, and the entire dissenting opinion of Justice Bardeen, proceed upon the same view, that is, that the constitutionality of the legislative act was the only issue.

II.

If complaint is defective in not stating "presentation to the common council for allowance" and such defect may be availed of on demurrer, still if the charter of 1891 is unconstitutional and the plaintiff had the right to sue after presentation of its claim to the common council and disallowance or refusal to allow the same, as must be the fact, if the charter of 1891 is unconstitutional, then the judgment of the state court must be reversed.

NOTE 6. Spence vs. Spence, 17 Wis., 462 (448) at 469 (455);
Roe vs. Lincoln Co., 56 Wis., 66, 70;
Pine Valley vs. Unity, 40 Wis., 682, 685;
Kusterer vs. Beaver Dam, 52 Wis., 146, 149;
Flanders vs. McVicker, 7 Wis., 372.

If the demurrer was sustained on account that presentation of the account for allowance was not alleged, then the order and judgment should have been without prejudice. (Note 7).

On the contrary, the judgment is upon the merits. That is, upon the ground that the charter of 1891 was constitutional. The order sustaining the demurrer (record, p. 14) refers to the urging of the constitution of the United States, and refers to no other matter as having been presented or considered. Further, the judgment on demurrer stands upon, and is the enforcement of, the opinion of the state Supreme Court, which relates to no matter except the constitutionality of the charter of 1891.

A judgment resting on such a basis must be upon the merits. The opinion of the state Supreme Court may properly be adverted to show whether the judgment is without prejudice or upon the merits.

It is held in Ellis vs Northern Pacific Railroad Co. (Note 8), that an order sustaining a demurrer, and giving leave to plead over, stands as *res ajudicata;* that the order determined between the parties, conclusively, the matter considered on the demurrer, without any final judgment. Justice Winslow says (p. 465) "But the decision of this court upon a demurrer, upon the questions properly involved, cannot be reviewed by the circuit court, nor indeed, by this court, save upon motion for rehearing. Such questions are fianlly decided and settled for that case and, as between the parties to that litigation, for all time. * * * The question was no longer an open one."

To the same effect is Alley vs. Nott (Note 9.) Therein Mr. Chief Justice Waite said, (Page 475); "A demurrer to a complaint because it does not state facts sufficient to

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NOTE 7. Rogers vs. Allis, 82 Wis., 509,

NOTE 8. 80 Wis., 459, 464-5.

NOTE 9. 111 U. S., 472, 475.

constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause, as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial, except at the discretion of the court, and, if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."

If the present judgment stands, construed as it must be in the light of the opinion of the state court, then, it not only bars any subsequent action for this quarter's hydrant rental, but bars the plaintiff from urging, in any action upon any subsequently accruing quarter's hydrunt rental, the invalidity of the charter of 1891. (Note 10).

MOSES HOOPER,

For Plaintiff in Error.

NOTE 10. Beloit vs. Morgan, 74 U. S., 619;
Cangolle vs. Ferrie, 80 U. S., 465, 469;
Railroad vs. Missouri, 152 U. S., 301, 314-15.